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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536

[redacted]

OCT 23 2003

FILE: SRC 03 032 50467 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn. The matter will be remanded to the director for further action.

The petitioner is a condominium/hotel property management company. It seeks to employ the beneficiary as a condominium/hotel industry trainee. The director determined that the beneficiary already possessed substantial training and expertise in the proposed field of training.

On appeal, counsel submits a brief stating that the director erred in her decision because the petitioner does not already possess training and expertise in the proposed field of training. Counsel also states that this issue was not raised in the director's request for evidence and so should not be the sole basis for denial.

Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii), provides classification for an alien having a residence in a foreign country, which he or she has no intention of abandoning, who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment.

The regulation at 8 C.F.R. § 214.2(h)(7) states, in pertinent part:

> (ii) Evidence required for petition involving alien trainee--(A) Conditions. The petitioner is required to demonstrate that:
>
> (1) The proposed training is not available in the alien's own country;
>
> (2) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;
>
> (3) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and

(4) The training will benefit the beneficiary in pursuing a career outside the United States.

(B) Description of training program. Each petition for a trainee must include a statement which:

(1) Describes the type of training and supervision to be given, and the structure of the training program;

(2) Sets forth the proportion of time that will be devoted to productive employment;

(3) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;

(4) Describes the career abroad for which the training will prepare the alien;

(5) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and

(6) Indicates the source of any remuneration received by the trainee and any benefit, which will accrue to the petitioner for providing the training.

(iii) Restrictions on training program for alien trainee. A training program may not be approved which:

(A) Deals in generalities with no fixed schedule, objectives, or means of evaluation;

(B) Is incompatible with the nature of the petitioner's business or enterprise;

(C) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;

(D) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;

(E) Will result in productive employment beyond that which is incidental and necessary to the training;

(F) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;

(G) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or

(H) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

The petitioner filed its petition on November 13, 2002. On November 19, 2002, the director issued a request for additional evidence, with six specific requests: "1) Describe the physical plant and classroom facilities; 2) Submit photographs of the training facilities; 3) Submit a copy of the training program; 4) Submit evidence of the educational background and qualifications of the trainers; 5) Submit evidence that the training is not available abroad; 6) What are the intended dates of training?" Counsel submitted a timely and complete reply on February 19, 2003. On March 24, 2003, the director denied the petition with the following statement:

> The petitioner states that, 'The Trainees [sic] background establishes that she is well qualified to receive proposed [sic] training because she has completed her studies in her country to [sic] the administration of industries dedicated to tourist services, besides having more that [sic] two years of experience in the Hotel industry, she has never been trained before on the U.S. practices. The combination of hr [sic] related education, experience and skills, and her interest in a career in the hotel industry, makes her an ideal candidate to undergo the proposed training, as she has some related skills, but has yet to receive specific formal managerial training.' 8 CFR 214.2(h)(7)(iii)(C) states in Part A training [sic] program **may not** be approved which is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field training [sic]. (Emphasis in original).

The issue of whether the beneficiary possesses substantial training and expertise is clearly relevant to the adjudication; however, basing the entire denial on this ground without giving the petitioner notice and opportunity to respond to a request for evidence warrants a withdrawal of the director's decision to deny

the petition. The purpose of the request for evidence is to elicit additional information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). As the director requested evidence that related only to the physical plant and classroom facilities, the training program and dates, the background and qualifications of the trainers, and evidence that the training is not available abroad, the petitioner reasonably presumed that the evidence it had initially submitted regarding the beneficiary's prior experience was sufficient to establish eligibility for this visa classification. The petitioner's presumption was reasonable, given the purpose of a request for evidence as described at 8 C.F.R. § 103.2(b)(8).

Beyond the decision of the director, it is not clear that the training could not be provided in the beneficiary's home country. Counsel submitted a letter stating that formal training at a university is not available, but the petitioner stated that there are condo/hotels in Venezuela. Counsel asserted that the condo/hotel market was established in Venezuela five years ago and is growing. The petitioner did not establish that these facilities could not provide a similar training program.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the beneficiary's previous experience and training, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's March 24, 2003 decision is withdrawn. The matter is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.